IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 18, 2009 Session

STATE OF TENNESSEE v. UNGANDUA INGRAM

Appeal from the Circuit Court for Marshall County
No. 17697 Robert Crigler, Judge

No. M2008-02765-CCA-R3-CD - Filed October 21, 2009

The Defendant, Ungandua Ingram, was charged with two counts of selling .5 grams or more of cocaine; two counts of delivery of .5 grams or more of cocaine; two counts of conspiring to sell .5 grams or more of cocaine; one count of possession of .5 grams or more of cocaine with intent to sell; and one count of possession of .5 grams or more of cocaine with intent to deliver, each a Class B felony. See Tenn. Code Ann. § 39-17-417(c)(1). He was also charged with one count of simple possession of marijuana and one count of possession of unlawful drug paraphernalia, each a Class A misdemeanor. See Tenn. Code Ann. §§ 39-17-418(c), -425(c)(2). Following a jury trial, he was convicted of one count of the sale of .5 grams or more of cocaine; one count of conspiring to sell .5 grams or more of cocaine; one count of possession of .5 grams or more of cocaine with intent to sell; one count of simple possession of marijuana; and one count of possession of unlawful drug paraphernalia. The trial court sentenced the Defendant to an effective sentence of eight years and six months, one year of which it ordered to be served in the Marshall County Jail, with the remainder to be served on probation. In this direct appeal, the Defendant argues that: (1) the trial court erred in denying his motion to suppress evidence found on his person and in his home; (2) the trial court erred in upholding the State's use of a peremptory challenge under Batson v. Kentucky, 476 U.S. 79 (1986); (3) the State presented evidence insufficient to convict him of conspiring to sell .5 grams or more of cocaine; and (4) the trial court erred in admitting certain statements of his co-defendant. After our review, we conclude that the trial court erred in denying the Defendant's motion to suppress the fruits of a search of his person. Accordingly, we reverse the Defendant's convictions for the sale of .5 grams or more of cocaine and conspiring to sell .5 grams of more of cocaine. We remand those cases for a new trial. We affirm the Defendant's convictions for possession of .5 grams or more of cocaine with intent to sell, possession of marijuana, and possession of unlawful drug paraphernalia.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in Part; Reversed in Part; Remanded

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Raymond W. Fraley, Jr., Fayetteville, Tennessee, for the appellant, Ungandua Ingram.

Robert E. Cooper, Jr., Attorney General and Reporter; Melissa Roberge, Assistant Attorney General; Charles Crawford, District Attorney General; Weakley E. Barnard, Assistant District Attorney General; and William Bottoms, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

Testimony was first heard in this case at a suppression hearing held on February 1 and March 13, 2008. The events underlying this case involved two controlled crack cocaine buys made by a confidential informant ("CI") in the employ of the Seventeenth Judicial District Drug Task Force ("Task Force"). The Task Force members working that evening were Director Tim Lane, Deputy Billy Ostermann of the Marshall County Sheriff's Department, Special Agent Shane George of the Shelbyville Police Department, and Assistant Director Tim Miller. The Task Force's CI, Joe Armstrong, also testified.

Their testimony established that on April 13, 2007, the Task Force arranged for Mr. Armstrong to make a controlled buy from Tonya Hampton, the co-defendant in this case.[1] Agent George was predominantly responsible for handling Mr. Armstrong, while Deputy Ostermann acted as the Task Force "tech guy." Assistant Director Miller coordinated the street-level operation, while Director Lane supervised.

Assistant Director Miller, Deputy Ostermann, Agent George, and Mr. Armstrong met at a predetermined location before the first buy. Mr. Armstrong had already called Hampton, the target, and arranged to buy an "eight-ball" of crack cocaine. Deputy Ostermann placed transmitting equipment on Mr. Armstrong for the purpose of recording any conversation that occurred during the buy. Agent George searched Mr. Armstrong for money, weapons, and contraband. Finding none, he issued Mr. Armstrong $150 in cash after recording the bills' serial numbers.

At about 5:00 p.m., Agent George dropped Mr. Armstrong off about a half of a mile away from Hampton's house. He then drove toward the house, located on Glenn Avenue, and parked across the street with a view of the house's driveway, in which a blue Chevrolet Impala was present. Assistant Director Miller also watched from this location while Deputy Ostermann drove to a parallel street and monitored Mr. Armstrong's recording. Deputy Ostermann was the only agent who could hear the recording in real time.

Mr. Armstrong entered the house and met Hampton. Because a number of other people were present, Hampton took Mr. Armstrong into a separate room and closed the door. Hampton then used

[1] The cases were severed for purposes of trial. This appeal involves only the charges against Mr. Ingram.

her cell phone to call a person who Mr. Armstrong believed was her drug supplier, telling that supplier to deliver the eight-ball of crack cocaine to her house. Mr. Armstrong believed he recognized the supplier's voice as the Defendant. After the call stopped, Hampton told Mr. Armstrong that his nephew would be delivering the drugs. Mr. Armstrong asked which of his nephews she meant; Hampton replied with the Defendant's name. She then left the room for about ten minutes, during which two of the other people in the house came into the room and spoke to Mr. Armstrong.

During this period of time, Agent George and Assistant Director Miller observed a white "round body" Chevrolet Caprice drive into Hampton's driveway. They saw a black male exit the vehicle and enter the house. Shortly thereafter, Hampton returned to the room in which Mr. Armstrong was waiting and exchanged, for $150, what appeared to Mr. Armstrong to be a small quantity of crack cocaine. Mr. Armstrong then left the house through the back door adjacent to the house's driveway. On his way out, he saw the Defendant, his nephew. The two did not speak to each other due to a previous falling out.

The Caprice left Hampton's residence shortly thereafter. Agent George, having been rejoined by Mr. Armstrong and believing the occupant of the Caprice to be Hampton's supplier, radioed Deputy Ostermann to search the area for the vehicle. Deputy Ostermann did so, quickly locating it parked in a residential driveway on nearby Saint Ann Street. Mr. Armstrong told Agent George he had seen the Defendant at Hampton's residence, and confirmed that the Defendant drove a white Caprice and lived on Saint Ann Street. After learning this information over the radio, Director Lane searched the Department of Motor Vehicles database for the Defendant's name, finding a driver's license listing the Saint Ann address. He also searched for any vehicles registered to that driver's license; the database returned a vehicle fitting the Caprice's description.

Task Force members then decided to use Mr. Armstrong to make a second controlled buy from Hampton. Agent George drove to Mr. Armstrong's residence, where Mr. Armstrong called Hampton and requested another eight-ball of crack cocaine. Hampton agreed. Agent George again searched Mr. Armstrong and provided him with $150 in cash, the serial numbers having been recorded.

Agent George then dropped Mr. Armstrong off near Hampton's house at about 8:30 p.m. Director Lane saw what he believed to be the Defendant's Caprice driving in the Glenn Avenue area at about this time, and he speculated that the Defendant was returning to Hampton's residence. Mr. Armstrong did not see the Defendant at Hampton's house during this buy, however. After entering Hampton's house, Mr. Armstrong learned that the eight-ball had already been delivered and that Hampton had mistakenly sent her sister to bring it to Mr. Armstrong's residence. Hampton called her sister and asked her to return with the eight-ball. She did so; Mr. Armstrong paid Hampton for a small bag of what appeared to him to be crack cocaine. He then left and rejoined Agent George.

After recovering the crack cocaine from Mr. Armstrong and releasing him, Assistant Director Miller radioed Agent George and told him he had sighted the Caprice parked on the side of a street

two blocks away from Glenn Avenue. The car's engine was running and it had its lights on, but it was unoccupied. Agent George was instructed to stop in a certain location and prepare to follow the Caprice. Agent Miller, observing the Caprice directly, then saw three figures come out of the nearby house and enter the car. These events occurred at about 9:00 p.m.

The Caprice drove off, and Agent George, recognizing it as the car he had seen at the first controlled buy, followed it. As he followed it, Agent George observed the Caprice fail to come to a complete stop at two stop signs. He radioed this information to Director Lane and Assistant Director Miller, each of whom was driving his own car in the area. After a few moments, the two pulled in front of Agent George and followed the Caprice. Shortly thereafter, the Caprice entered the parking lot of a Shell gas station; Director Lane and Assistant Director Miller activated their blue lights and drove in behind it. Agent George pulled around the side of the Shell station in order to stay out of sight while confirming that the situation was under control; he saw the Defendant exit the Caprice, and noted that the Defendant's physical appearance and clothing matched those of the man he had seen at Hampton's house during the day's first controlled buy. Deputy Ostermann was not involved with the stop.

Assistant Director Miller stopped his vehicle at the Shell station, exited, and approached the Caprice's driver's side door. Director Lane did the same, but approached the passenger side door. As he did so, he saw the Defendant in the driver's seat and two young children in the backseat. Assistant Director Miller made first contact with the Defendant, informing him that they had stopped him because of his stop sign violations. Director Lane then informed the Defendant that he and his team had been conducting a drug investigation. In order to discuss the investigation away from the children, Director Lane asked the Defendant to exit the Caprice and move to the back of the vehicle. The Defendant did so.

At about this time, Mr. Armstrong and another of the Defendant's relatives arrived at the Shell station and asked Director Lane for permission to take care of the Defendant's children. Director Lane told them he could not yet make a decision about the children, and he instructed them to leave so as to avoid interference with his investigation. Mr. Armstrong and the other relative drove away.

Director Lane informed the Defendant that the Task Force "had made a controlled purchase of crack cocaine earlier in the evening and that [he] felt that there was enough probable cause that if [he] wanted to that [he] could effect an arrest of [the Defendant] for distribution of cocaine base . . . ." On this basis, Director Lane searched the Defendant's person. Among bills totaling about $600, Director Lane found four of the twenty-dollar bills Agent George had given Mr. Armstrong to make the first controlled buy of the evening. Director Lane did not find any drugs. The Defendant consented to a search of his vehicle; Assistant Director Miller removed the children and searched the vehicle, finding nothing. He did not search the children.

Director Lane informed the Defendant that he had found the incriminating twenty-dollar bills. He also told the Defendant that he consequently "felt [he] had enough probable cause to prepare a

search warrant [for the Defendant's residence] and for [him] to go before a judge and have the judge look at the search warrant, determine whether or not the judge also agreed that [he] had enough probable cause." Six or seven minutes had elapsed since the stop began. Mr. Armstrong and the Defendant's other relative returned at this time. Mr. Armstrong said that the delay was closer to twenty minutes, as he had spent ten minutes in the Shell station while his brother pumped gas, and another ten minutes going to a nearby liquor store.

The Defendant began to bargain with Director Lane, asking whether his children could go with his relatives if he consented to a search of his residence. Director Lane responded in the affirmative, but also testified that he never threatened to take the children to the Department of Children's Services ("DCS") or to prevent the Defendant's relatives from taking them once the situation stablized. Director Lane also informed the Defendant that his Caprice, having been used in a crime, was subject to forfeiture, but that the Defendant's relatives could also take the car if he consented to a search of his residence. Director Lane also told the Defendant he did not have to consent to the search.

The Defendant consented. Assistant Director Miller placed the Defendant in his patrol car, while Director Lane radioed Deputy Ostermann and Agent George and told them to proceed to and secure the outside of the Defendant's residence. Mr. Armstrong and the Defendant's other relative took custody of the Defendant's children. Assistant Director Miller, Director Lane, and the Defendant arrived at the Defendant's Saint Ann Street house a few minutes later. The Defendant unlocked the door and led the Task Force members into the house. He proceeded to a particular room and produced from a drawer a small bag of what appeared to be crack cocaine. He handed the bag to Director Lane. The Task Force searched the rest of the house. Director Lane found a bulletproof vest and a nine millimeter Ruger pistol in a nearby closet; Deputy Ostermann found a larger bag of what appeared to be powder cocaine, a small bag of what appeared to be marijuana, and a set of digital scales hidden in the Defendant's kitchen. The scales appeared to be covered with powder cocaine residue. Finally, the Task Force recovered about $2000 in cash. Later testing revealed that the Task Force had found a bag of 14.6 grams of powder cocaine, another bag of 3.3 grams of crack cocaine, and a bag of 3.5 grams of marijuana.

After finding these items, Director Lane informed the Defendant of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). The Defendant waived his right to remain silent and to have a lawyer present. Director Lane then discussed the possibility of the Defendant doing CI work for the Task Force against the Defendant's cocaine supplier. The Defendant asked Director Lane for a few days to think about that proposition; Director Lane agreed, gave the Defendant his contact information, and told the Defendant that if he did not respond within a few days charges would be brought against him directly through a grand jury.

The Task Force members therefore chose not to take the Defendant into custody on the drug charges at issue in this case. They also did not cite him for his stop sign violations. Director Lane and Assistant Director Miller both testified that the Defendant was not under arrest at the Shell station or at any other time, although Director Lane noted that he would not have allowed the

Defendant to drive the Caprice to his residence after the Shell station stop. Assistant Director Miller testified, however, that the Defendant was not free to leave when he was first stopped but was free to leave after being given a verbal warning for his stop sign violations.

The Defendant also testified at the suppression hearing. He said that Director Lane checked his driver's license at the beginning of the Shell station stop, then ordered him to the rear of the car. Director Lane then threatened to send the Defendant's children to "human resources" if he did not consent to a search of his residence. When the Defendant's relatives returned to the scene of the stop, Director Lane said they could take the children if the Defendant consented to search. The Defendant said he did not know and was not informed that he could refuse consent, but also said he did not remember consenting to the search. The Defendant denied any knowledge of the drugs Task Force members found in his house. He also denied that Director Lane ever "Mirandized" him, and noted that he had to walk back to the Shell station to retrieve his car after having his keys returned upon the Task Force's departure.

The trial court denied the Defendant's motion to suppress in an order dated May 21, 2008, finding that the Task Force validly searched the Defendant's person incident to arrest and that the Defendant voluntarily consented to the search of his residence.

This case was tried before a jury on September 24 and 25, 2008. Trial witnesses largely repeated the testimony heard at the suppression hearing. Mr. Armstrong, however, described in more detail the conversation between him and Hampton regarding the Defendant. He testified that Hampton, after calling her source, said "you wouldn't guess who is bringing the dope. Your nephew." Mr. Armstrong, who has six or seven nephews, asked for his name, to which Hampton replied, "Ungandua." After Hampton left the room, Mr. Armstrong heard a car drive into the driveway, and believed he heard the Defendant saying "here is your stuff." Mr. Armstrong noted that the Defendant was not intended as a target of the investigation and that he had never before known the Defendant to sell drugs.

Mr. Armstrong did not see the Defendant during the second controlled buy, and Hampton said nothing about him. Mr. Armstrong also clarified the reason for his anger toward the Defendant, explaining that the Defendant thought Mr. Armstrong had yelled at the Defendant's mother, and had consequently hit Mr. Armstrong with a pistol. The State introduced the recordings from both controlled buys in which Mr. Armstrong participated. Director Lane opined that the Defendant was neither free to go nor under arrest during the Shell station stop.

The State called Tennessee Bureau of Investigation forensic scientists Agent John Scott, Jr. and Agent Brent Trotter to testify. Both were qualified as experts in forensic chemistry. Agent Scott tested the substances recovered by Mr. Armstrong during his controlled buys from Hampton; he testified that both were composed of rock-like cocaine, in the respective amounts of 3.1 grams and 2.5 grams. Agent Trotter confirmed Director Lane's testimony at the suppression hearing that the Task Force recovered 14.6 grams of powder cocaine, 3.3 grams of rock-like cocaine, and 3.5 grams of marijuana from the Defendant's residence.

At the close of the State's proof, the trial court granted the Defendant's motion for a judgment of acquittal on counts four through six of his indictment, holding that the State had produced insufficient evidence to prove that the Defendant had sold, delivered, or conspired to sell .5 grams or more of cocaine during the second controlled buy at Hampton's residence.

The Defendant chose not to testify at trial, but presented the testimony of Mr. Armstrong and Mr. Armstrong's brother, the men who had driven his children away from the Shell station. Both confirmed their actions surrounding the stop and affirmed that they were gone for at least fifteen minutes between encounters with Director Lane and Assistant Director Miller. The Defendant was convicted of one count of selling .5 grams or more of cocaine; one count of conspiring to sell .5 grams or more of cocaine; one count of possession of .5 grams or more of cocaine with intent to sell; one count of simple possession of marijuana; and one count of possession of unlawful drug paraphernalia. He now appeals.

Analysis

I. Motion to Suppress

The Defendant first contends that the trial court erred in denying his motion to suppress the evidence the Task Force recovered from his person and his residence. "[A] trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). We review a trial court's applications of law to fact de novo, however. See State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001). The party prevailing at the suppression hearing is further "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from such evidence." Odom, 928 S.W.2d at 23.

The Fourth Amendment to the United States Constitution states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." Our supreme court has noted that "a warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997).

A. Search of the Defendant's Person

The Defendant first contends that the trial court erred in holding that Director Lane searched him incident to arrest, and in denying his motion to suppress the fruits of that search on that basis. One exception to the Fourth Amendment warrant requirement provides that a police officer may, incident to a lawful arrest, search the person arrested and the immediately surrounding area. See Chimel v. California, 395 U.S. 752, 862-63 (1969). The Defendant argues, however, that he was not under arrest at the time Director Lane conducted his search and that the search was illegal because it was not justified by any other exception to the warrant requirement. The State argues that the Defendant was under arrest when searched at the Shell station. The State concedes that police may not search a person merely because they have probable cause to arrest that person; an arrest must

actually take place before police can conduct a search incident to arrest. See State v. Crutcher, 989 S.W.2d 295, 302 (Tenn. 1999). Because Director Lane did more than merely frisk the Defendant, his intrusion rose above the level allowed in Terry v. Ohio, 392 U.S. 1 (1968).

Tennessee courts recognize three different types of interactions between law enforcement and the public, namely "(1) a full scale arrest which must be supported by probable cause; (2) a brief investigatory detention which must be supported by reasonable suspicion; and (3) brief police-citizen encounters which require no objective justification." State v. Daniel, 12 S.W.3d 420, 424 (Tenn. 2000) (citations omitted). As a threshold matter, it is clear that the Task Force's stop of the Defendant was at least a seizure rather than merely a casual encounter between police and a citizen, as Director Lane and Assistant Director Miller activated their blue lights upon pulling into the Shell station. See State v. Day, 263 S.W.3d 891, 902 (Tenn. 2008). We must therefore decide whether the Task Force's interaction with the Defendant at the Shell station rose to the level of a full scale arrest.

> In Tennessee, an arrest is more specifically defined as the "taking, seizing, or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subjects the person arrested to the actual control and will of the person making the arrest." An arrest may be affected without formal words or a station house booking. However, there must be actual restraint on the arrestee's freedom of movement under legal authority of the arresting officer.

Crutcher, 989 S.W.2d at 301-02 (internal citations omitted). "If law enforcement officers intend to justify a search as incident to an arrest, it is incumbent upon them to take some action that would indicate to a reasonable person that he or she is under arrest." Id. at 302. Further, "some words or actions should be used that make it clear to the arrestee that he or she is under the control and legal authority of the arresting officer, and not free to leave. " Id.

In Crutcher, the defendant fled, on a motorcycle, from a police officer attempting to pull him over for speeding. Id. at 298. After a short pursuit, the defendant crashed into an embankment. The officer placed one of the defendant's arms around his back, intending to handcuff him; when the defendant informed the officer of injuries he had suffered, however, the officer called an ambulance and "made no additional effort to arrest [the defendant] at the accident scene." Id. The officers allowed one of the defendant's friends to take his wrecked motorcycle, but not before searching a backpack and jacket attached to it, in which officers found a loaded handgun and a pill bottle containing cocaine. Id. The defendant was later arrested.

Our supreme court upheld the trial court's ruling that the Crutcher defendant was not under arrest and that the fruits of the motorcycle search should have been suppressed. Id. at 302. In doing so, the court considered it important that: (1) the officer did not believe he had arrested the defendant; (2) no one discussed criminal charges or arrest procedures with the defendant; and (3) the

defendant was not taken into custody. Id. The court explained what the police should have done in order to effect an arrest:

> [A]ctions that would have accomplished [an arrest] included, but were not limited to, accompanying the [defendant] to the hospital until the arrest warrant could be obtained and served, telling the [defendant] that he should consider himself in custody pending actual service of the arrest warrant, or any other words or actions that would have conveyed the same message.

Id.

In its brief, the State largely relies on State v. Nidiffer, 173 S.W.3d 62 (Tenn. Crim. App. 2004), to support its position that the Defendant was under arrest, citing it for the correct proposition that a person can be placed under arrest without being placed in handcuffs or subjected to formal booking procedures. In Nidiffer, this Court held that a defendant was under arrest when he refused, after being taken to a hospital following a car crash, to consent to a blood alcohol test. Id. at 63. In doing so, we considered "substantive" but not dispositive the fact that an officer read the Nidiffer defendant the implied consent form, the first words of which state, "You are under arrest . . . ." Id. at 66. We also considered as lesser factors that the officers stood between the defendant's hospital bed and the door, and testified that they would have prevented the defendant from leaving had he attempted to do so. Id.

We acknowledge that Director Lane and Assistant Director Miller took some action tending to establish "actual restraint on the [defendant's] freedom of movement under legal authority of the arresting officer." Id. at 301-02 (citation omitted). They directed the Defendant to move to the back of his Caprice before speaking with them, although they may simply have wished to question the Defendant out of his children's presence. They also did not allow the Defendant to drive his own vehicle to his house, instead transporting him in a Task Force car; the Defendant was left at his home after the search was completed, however.

Under these circumstances, we conclude that the Defendant was not placed under arrest at the Shell station. As in Crutcher, the officers involved in this case testified that they did not arrest the Defendant. See Crutcher, 989 S.W.2d at 302. They also did not handcuff him, transport him to a police station for booking procedures, or discuss arrest procedures with him. The officers in Nidiffer told their defendant that he was under arrest; in this case, Director Lane specifically testified that the Defendant was not under arrest. Director Lane also said nothing else to the Defendant that would have conveyed the fact "that he should consider himself in custody." Crutcher, 989 S.W.2d at 302. He did not, for instance, read the Defendant Miranda warnings until after searching the Defendant's residence. Assistant Director Miller also testified that he viewed the Defendant as free to leave after the initial seizure was completed. In our view, Director Lane's requirement that the Defendant be transported to his residence in a police vehicle does not outweigh the numerous other indicators that no arrest took place until after the Defendant was indicted.

Because no other exception to the Fourth Amendment's warrant requirement justifies Director Lane's search, we conclude that the trial court erred in denying the Defendant's motion to suppress the fruits of that search. Thus, the State should not have been allowed to introduce as evidence the twenty-dollar bills found in the Defendant's possession which had been used to purchase the cocaine by the CI at the residence of Tonya Hampton. Even though there was other evidence connecting the Defendant to the drug transactions which took place at Tonya Hampton's residence, the Defendant's possession of these twenty-dollar bills was particularly damning. In our view, this error involved a substantial right which more probably than not affected the judgment in those convictions. See Tenn. R. App. P. 36(b). Therefore, we conclude that the convictions for the sale of .5 grams or more of cocaine and conspiracy to sell .5 grams or more of cocaine must be reversed. Those charges are remanded for a new trial. We conclude, however, that the erroneous admission of this evidence is harmless as it relates to the Defendant's remaining convictions.

B. Search of the Defendant's Residence

Another exception to the Fourth Amendment warrant requirement provides that a police officer may warrantlessly search a person's residence if the officer obtains that person's consent. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). The Defendant next contends that the trial court erred in holding that he validly consented to the search of his residence.

i. Voluntariness

"[T]he Fourth and Fourteenth Amendments require that [the State] demonstrate that [consent to search] was in fact voluntarily given, and not the result of duress or coercion, express or implied." Schneckloth, 412 U.S. at 248. The Defendant first contends that Director Lane and Assistant Director Miller coerced him into allowing the residence search by threatening to forfeit his vehicle and turn his children over to DCS if he refused. The trial court obviously accredited the testimony of Director Lane and Assistant Director Miller in finding that they did not make such threats. After our review of the record, we conclude the evidence does not preponderate against that finding. See Odom, 928 S.W.2d at 23. The trial court did not err in holding that the Defendant's consent was not the result of duress or coercion as a result of these alleged threats.

ii. Attenuation

The Defendant also argues that the evidence recovered at his residence was the fruit of the unconstitutional search of his person at the Shell station. Our supreme court has recognized "that 'a consent to search that is preceded by an illegal seizure is not fruit of the poisonous tree if the consent is both (1) voluntary, and (2) not an exploitation of the prior illegality.'" State v. Garcia, 123 S.W.3d 335, 346 (2003) (quoting Wayne LeFave, 3 Search and Seizure § 8.2(d) at 656 (3d ed. 1996)). We have determined that the trial court did not err in holding that the Defendant voluntarily gave consent to search. In determining "whether the primary taint of an unlawful seizure has been sufficiently attenuated from the voluntary consent," our supreme court has adopted factors used in Brown v. Illinois, 422 U.S. 590 (1975): "(1) the temporal proximity of the illegal seizure and consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." Garcia, 123 S.W.3d at 346.

In Brown, the United States Supreme Court applied these factors to a situation in which a confession was taken after an illegal arrest. Brown, 422 U.S. at 591. We note that this attenuation test, by its language in Garcia, applies only to consensual searches that are preceded by an unlawful seizure. The consensual search in this case, however, was preceded by a lawful seizure followed by an unlawful search. Recognizing this, the Defendant asks us to apply the attenuation concept to this case using the Brown factors, essentially arguing that his consent, even if voluntary, would not have been given had he not been presented with the four incriminating twenty-dollar bills unlawfully found on his person.

We decline to do so. Both Brown, in which there was an illegal arrest, and Garcia, in which there was an illegal seizure, address situations in which the contact between police and a defendant would not have occurred but for unlawful police action; in other words, the incriminating evidence in those cases certainly "would not have come to light but for the illegal actions of the police" because there would have been no contact without those illegal actions, a threshold requirement announced in Wong Sun v. United States, 371 U.S. 471, 487-88 (1963). Here, however, the police lawfully initiated contact with the Defendant, having knowledge of his suspected crimes earlier in the day. Under these circumstances, we conclude that the application of the Brown factors is inappropriate, as they assume that no police contact would have taken place but for unconstitutional police conduct. After our review of the record, we also conclude that the Defendant has not otherwise demonstrated, in accordance with Wong Sun, that he would not have consented to a search of his residence but for Director Lane's presentation of the incriminating twenty-dollar bills. This issue is without merit.

II. Batson Challenge

During jury selection, the State peremptorily challenged one of the two African-American members of the venire. The Defendant, an African-American, challenged the State's use of its peremptory challenge as race-based in violation of Batson v. Kentucky, 476 U.S. 79 (1986). The State articulated three race-neutral reasons for using the peremptory strike: (1) the juror "never once looked at" the assistant district attorney general during his voir dire; (2) the juror looked at defense counsel "continuously" during his voir dire; and (3) she was the only juror to immediately nod her head to defense counsel's inquiry about whether police should be "held to a higher standard." The trial court accepted these reasons as race-neutral and held that the State had not violated Batson.

The United States Supreme Court has articulated the process through which a party can show a violation of the Equal Protection Clause of the Fourteenth Amendment in an opposing party's use of peremptory challenges during jury selection. First, the challenging party must "make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Batson, 476 U.S. at 93-94. To establish a prima facie case in the context of a peremptory challenge of a venire member, a defendant

> first must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to

> which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"

Batson, 476 U.S. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

> "Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination."

Id. "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors . . . related to the particular case to be tried." Batson, 476 U.S. at 97. The trial court must then decide whether the defendant has shown purposeful discrimination. Id.

"This Court reviews the findings of a trail court relative to a Batson challenge under an abuse of discretion standard. That is, 'we cannot substitute our judgment for that of the trial court or declare error absent a finding that the trial judge abused his or her discretion.'" State v. Darrick Watkins, No. 01C01-9712-CC-00589, 1999 WL 447320, at *4 (Tenn. Crim. App., Nashville, July 1, 1999) (citations omitted).

After our review of the record, we conclude that the Defendant has not shown that the trial court abused its discretion. The trial court did not specifically articulate whether or not it believed the Defendant had made a prima facie case of purposeful discrimination. Regardless, we cannot conclude that the trial court abused its discretion in viewing as legitimate the State's offered race-neutral concerns regarding the challenged juror's apparent indifference to the State and receptivity to defense counsel. This issue is without merit.

III. Sufficiency of the Evidence of Conspiracy

The Defendant next contends that the State presented evidence insufficient to convict him of conspiracy to sell .5 grams or more of crack cocaine. Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

It is an offense for a defendant to knowingly sell a controlled substance, including any substance containing cocaine. See Tenn. Code Ann. § 39-17-417(a)(3), (c)(1).

> The offense of conspiracy is committed if two or more people, each having the culpable mental state for the offense which is the object of the conspiracy and each acting for the purpose of promoting or facilitating commission of the offense, agree that one or more of them will engage in conduct which constitutes such offense.

Tenn. Code Ann. § 39-12-103(a). "No person may be convicted of conspiracy to commit an offense unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by the person or by another with whom the person conspired." Tenn. Code Ann. § 39-12-103(d).

We have concluded that the trial court erred in denying the Defendant's motion to suppress the fruits of the search of his person at the Shell station. To facilitate possible further appellate review, however, we will consider all of the evidence admitted at trial in evaluating the sufficiency of the evidence supporting the Defendant's conspiracy conviction.

The Defendant argues that no evidence in the record established that he knew Hampton planned to resell the crack cocaine he sold to her. We disagree; Agent Ostermann testified that, while listening over Mr. Armstrong's wire during the first controlled buy, he heard Hampton tell her supplier over the phone to "hurry up" because "[she had] someone waiting right here." This testimony was sufficient to allow any rational trier of fact to find the existence of an agreement between Hampton and her supplier.

Further, the Defendant's presence at Hampton's house within the relevant time frame and Director Lane's recovery of four recorded twenty-dollar bills from his person was sufficient to establish the Defendant's identity as Hampton's supplier. We therefore conclude the evidence was sufficient to establish that the Defendant knowingly agreed that Hampton would resell the crack cocaine and overtly acted for the purpose of promoting the commission of that offense. This issue is without merit.

IV. Admission of Co-Defendant Statements

The Defendant next contends that the trial court erred in denying his motion in limine to exclude Mr. Armstrong's testimony about certain statements Tonya Hampton made to him during the first controlled buy, and to exclude the recordings made in Hampton's house. Specifically, the Defendant objects to admission of Mr. Armstrong's testimony that Hampton named the Defendant as the deliverer of Mr. Armstrong's purchased crack cocaine. The trial court apparently held a hearing on the Defendant's motion, accepted this testimony as hearsay, but allowed it under Tennessee Rule of Evidence 803(1.2)(E), which recognizes as "not excluded from the hearsay rule" any "statement by a co-conspirator of a party during the course of an in furtherance of the conspiracy."

The Defendant has failed to include in the record a transcript of the trial court's hearing on this motion in limine, however. He has also failed to provide a copy of any order denying the motion. Because the Defendant has not provided a record sufficient for us to review this issue, we must presume the determinations made by the trial court are correct. State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991); see also Tenn. R. App. P. 24(b).

Conclusion

Based on the foregoing authorities and reasoning, the Defendant's convictions for possession of .5 grams or more of cocaine with intent to sell, simple possession of marijuana, and possession of unlawful drug paraphernalia are affirmed. The Defendant's convictions for one count of sale of .5 grams or more of cocaine and one count of conspiracy to sell .5 grams or more of cocaine are reversed. This case is remanded to the trial court for further proceeding consistent with this opinion.

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DAVID H. WELLES, JUDGE